Patricia Lynn Jacks
Attorney at Law
CA State Bar No. 226300
5790 Friars Road F8
San Diego, CA 92110
Tel. (619) 574-1625
Attorney for Petitioner

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DMITRI VALLERVEICH TATARINOV,

Petitioner,

PETITION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. §2241

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO,

Respondent.

EXCERPTS OF RECORD
PETITIONER DMITRI VALLERVEICH TATARINOV

Patricia Lynn Jacks
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DMITRI VALLERVEICH TATARINOV,

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PETITIONER DMITRI VALLERVEICH TATARINOV

INDEX

FROM DISTRICT COURT DOCUMENT 1

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FROM DISTRICT COURT DOCUMENT 1

Declaration of Patricia JacksTatarinov

Exhibit A to the Federal Habeas Petition

Consisting of page A-1 through A-3 of Doc 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DIMITRI VALERYEVICH TATARINOV,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,

DECLARATION OF PATRICIA LYNN JACKS-TATARINOV IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

I, Patricia Lynn Jacks-Tatarinov, am the wife of the defendant Dimitri Valeryevich Tatatrinov. We have been married since February 9, 1994. My husband is Russian. He immigrated to the United States in 1992. Russian is his first language. He has learned English since coming to this country. I do not speak Russian. We communicate only in English.

In 1996 we retained attorney Vladimir Verhovsky to represent my husband on a robbery charge brought against him as the result of an incident at a Nordstrom store on March 6, 1996. Mr. Verhovsky speaks fluent Russian and often communicated with my husband in the Russian language. He represented my husband at trial. My husband used a Russian interpreter at trial.

After a jury convicted my husband of robbery, we paid Attorney Verhovsky $2,500 as a retainer to represent my husband to appeal the conviction. We have paid Mr. Verhovsky a total of more than $20,000 to represent my husband on various matters, including but not limited to immigration pro-

ceedings that were instituted after the robbery conviction. The last payment was made in late November or early December 2000.

From late fall of 1996 through the summer of 1998, I continually asked Mr. Verhovsky how the robbery appeal was going. He gave responses such as, "appeals take several months," "appeals can take years," "the appeals court must believe we have some merit to the case as they have not responded," "I will call and check the status," and "the court is still looking into the matter." Having no legal background, I believed what Mr. Verhovsky told me. During the summer of 1998, however, I felt something was wrong. I called the superior court and spoke with someone in the records department. I was told the appeal was not active. I immediately called Mr. Verhovsky. He admitted he had not filed the appeal. I told him to tell my husband. Prior to that time, I had found myself "in the middle" between Mr. Verhovsky and my husband on a number of occasions. I did not understand the legal process and felt it was Mr. Verhovsky's job to explain how the problem happened and how it could be solved.

It took Mr. Verhovsky several months to tell my husband he had not filed the appeal. I repeatedly asked Mr. Verhovsky to do something to get the appeal started again. He gave a series of excuses, telling me it takes time, that he was working on it, and the like. I suggested to my husband on several occasions that he retain another attorney, as it appeared Mr. Verhovsky was not doing his job. My husband told me he wanted to stay with Mr. Verhovsky. My husband seemed loyal to Mr. Verhovsky because they are both Russian, and both speak Russian. Finally, in September 1999 Mr. Verhovsky filed a motion to reinstate the appeal. In less than a month he said the court denied the motion.

After that happened, Mr. Verhovsky led us to believe that nothing further could be done to revive the appeal. I do not recall what he said about

that, but do recall he proposed an alternate strategy. He suggested we ask the superior court to terminate my husband's probation and expunge the conviction. He filed a motion in April 2000 and asked the superior court to do that. The court heard and denied the motion on April 13, 2000. He made a second, similar motion that was denied by the superior court on November 3, 2000.

At that time, Mr. Verhovsky continued to represent my husband on an immigration matter. On November 28, 2000, he requested a payment of $500. We paid him promptly. On December 24, we received a letter from Mr. Verhovsky stating he had resigned from all of my husband's cases. The letter did not explain why. On January 19, 2001, we received a copy of the State Bar of California's *Stipulation Form – Actual Suspension* indicating Mr. Verhovsky was "suspended from the practice of law in the State of California for a period of sixty (60) days." We have since retained attorney James R. Patterson to represent my husband in the immigration case.

I took a course in criminal procedure during the summer of 2001. During the course it occurred to me that perhaps something could be done to revive my husband's appeal from the robbery conviction. I talked to my instructor about it and obtained a referral that led me to Attorney Wallingford. We retained him to take action to reinstate the appeal, and have recently asked him to prepare a petition for writ of habeas corpus.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: 10/2/2002

Patricia Lynn Jacks-Tatarinov

Patricia Lynn Jacks-Tatarinov

FROM DISTRICT COURT DOCUMENT 1

Declaration of Petitioner Dmitri VallerveichTatarinov

Exhibit B to the Federal Habeas Petition

Consisting of page B-1 through B-2 of Doc 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DIMITRI VALERYEVICH TATARINOV,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,

DECLARATION OF DMITRI VALLERVEICH TATARINOV IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

I, Dmitri Vallerveich Tatarinov, am the petitioner in the captioned case. I am married to Patricia Lynn Jacks-Tatarinov. I immigrated from Russia to the United States in 1992. My first language is Russian. I have learned English since coming to this country and communicate with my wife in English. However, when I appear in court I use a Russian interpreter.

In 1996 I retained attorney Vladimir Verhovsky to represent me on a robbery charge involving an incident at a Nordstrom store on March 6, 1996. Mr. Verhovsky speaks fluent Russian. We often communicated in the Russian language. He represented me at trial.

After a jury convicted me of robbery, my wife and I paid Attorney Verhovsky to represent me in the appeal. After that, I sometimes asked him how the appeal was going. He always told me the appeal was in progress. In 1998, Mr. Verhovsky admitted that he had not filed the appeal. I asked him several times to do something about it. Each time he said he would. Finally, in September 1999 Mr. Verhovsky filed a motion to reinstate the appeal. Later he told me the motion was denied. I believed the appeal was over and nothing more could be done about it.

EXHIBIT B
Page 1

Many times my wife told me I should hire a new attorney. I told her no, I wanted Mr. Verhovsky to represent me. I felt comfortable with Mr. Verhovsky because he could explain things to me in Russian. Also, because he is Russian, I felt he understood me and was trying to help me.

Many of the details of my dealings with Mr. Verhovsky are explained in my wife's declaration, exhibit A. I have read her declaration and it has been explained to me. Her declaration appears to be completely accurate.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: 10/07/2002

Dmitri TATARINOV
Dmitri Vallerveich Tatarinov

FROM DISTRICT COURT DOCUMENT 1

Docket Entries, California Court of Appeal Case Number D027293

Exhibit C to the Federal Habeas Petition

Consisting of page C-1 through C-4of Doc 1

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE FOURTH APPELLATE DISTRICT
DIVISION 1

PEOPLE OF THE STATE OF CALIFORNIA
☐ Plaintiff-Respondent
v.
TATARINOV, DIMITRI VALERYEVICH
☐ Defendant-Appellant

CASE NUMBER: D027293
NOA/PET DATE: 10/25/96
STATUS: Complete
PRIORITY: High priority
CAUSE: Appeal
CASE TYPE: Criminal
DISP DATE: 04/28/97
FINAL DISP: 17a
ORIGIN: Received from superior court
CATEGORY: crdt Jury trial conviction

TRIAL COURT INFORMATION

Case No.: SCD119330
County: San Diego
Court: San Diego County Superior Court
Judge: Ehrenfreund
Jud. Date: 09/10/96

ATTORNEY - PARTY

Office Of The State Attorney General
P O Box 85266
San Diego, CA 92186-5266
Bar No. SAGSDG-01

Plaintiff-respondent
People Of The State Of Calif.

Vladimir Verhovskoy
10388 Viacha Dr.
San Diego, CA 92124
Bar No. 00094039

Defendant-appellant
Dimitri Valeryev Tatarinov
Richard J. Donovan Correctional Facility
P.O. Box 73200
San Ysidro, CA 92073

Appellate Defenders Inc.
233 A Street, 12th Floor
San Diego, CA 92101-4010

Bar No. ADFI-001

Unknown
Unknown

DOCKET ENTRIES

11/14/96
Notice of appeal lodged/received (criminal).
Filed October 25, 1996 By Tatarinov

11/14/96
Telephone conversation with:
Atty. Verhovskoy - Has Been Retained On Appeal By Appellant.

01/23/97
Order filed.
Record Returned To Superior Court For Compliance With Rule 9. Due Back In 15 Days. P J

02/03/97
RECORD ON APPEAL FILED.**********
C-1, R-9, Includes Preliminary Hearing; One Conf. Envelope = Probation Report; Master Index

03/20/97
Appellant notified pursuant to rule 17(a).

04/28/97
Dismissal order filed.
Dismissed For Appellant'S Failure To File A Brief After 17a Notice. Kremer, P. J.

07/01/97
Remittitur issued.

09/10/97
Mail returned, unable to forward.
Dismissal Order To Appellant Returned

08/29/98
Case complete.

03/25/99
Record in storage with Cor-O-Van.

09/10/99
Motion filed.
Motion to Set Aside Dismissal and Reinstate Appeal
oppo due 9-20

09/10/99
Record Received from Storage.

09/24/99
Order filed.
Appellant's Motion to Set Aside Dismissal and to Reinstate Appeal filed on September 9, 1999 is DENIED. Haller, APJ

09/29/99
Record Returned to Storage.

08/08/01
Record Received from Storage.

CASE DISPOSITION / JUDGES PANEL INFORMATION

Disposition: 17a
Date: 04/28/97
Status: Final Disposition
Opinion Type:
Citation:
Notes: KREMER, P J

Authoring Judge:

VOTE

Judge 1:
Judge 2:
Judge 3:

COURT REPORTER INFORMATION

Name: J. (A-2) Castro
CSR No.: 90607
Trial Court Case No.: SCD119330
Estimated Compl. Date: 01/13/97
Filed Date: 01/14/97
Number of Extensions: 0

EXHIBIT C page 3

Name:	O. (1) Correa
CSR No.:	90686
Trial Court Case No.:	SCD119330
Estimated Compl. Date:	01/13/97
Filed Date:	01/14/97
Number of Extensions:	0

Name:	John Ross Avery
CSR No.:	8605
Trial Court Case No.:	SCD119330
Estimated Compl. Date:	01/13/97
Filed Date:	12/27/96
Number of Extensions:	0

Name:	Lois Elaine Mason
CSR No.:	3685
Trial Court Case No.:	SCD119330
Estimated Compl. Date:	01/13/97
Filed Date:	12/16/96
Number of Extensions:	0

Name:	Cynthia H Becker
CSR No.:	3998
Trial Court Case No.:	SCD119330
Estimated Compl. Date:	01/13/97
Filed Date:	01/15/97
Number of Extensions:	0

END OF DOCKET SHEET

EXHIBIT C page 4

FROM DISTRICT COURT DOCUMENT 1

Motion to Set Aside Dismissal Filed by AttorneyVerhovskoy

Exhibit D to the Federal Habeas Petition

Consisting of page D-1 through D-9 of Doc 1

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DIMITRI VALERYEVICH TATARINOV, Defendant and Appellant.	NO. D 027293 SUPER CT NO. 119330

MOTION TO SET ASIDE DISMISSAL AND TO REINSTATE APPEAL, SUPPORTING DECLARATION AND POINTS AND AUTHORITIES

On Appeal From the Judgment of the Superior Court

of the State of California, San Diego County,

Honorable Norbert Ehrenfreund, Judge

Vladimir Verhovskoy, Esq. (97039)
VERHOVSKOY & ASSOCIATES
PO Box 620129
San Diego, CA 92162-0129
(619) 702-5852

Attorney for Defendant and Appellant DIMITRI VALERYEVICH TATARINOV

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DIMITRI VALERYEVICH TATARINOV, Defendant and Appellant.	NO. D 027293 SUPER CT NO. SCD 119330

MOTION TO SET ASIDE DISMISSAL AND TO REINSTATE APPEAL [CAL RULES OF CT, RULE 45(e)]

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE:

Appellant moves this court for an order setting aside the dismissal of this appeal entered on April 28, 1997, and for permission to file appellant's opening brief.

The motion is made on the grounds that good cause exists for relieving appellant from his default under rule 45(e) of the California Rules of Court in that said default was solely the result of counsel's inadvertence, surprise, and/or neglect, and said dismissal was entered through no fault of appellant.

EXHIBIT Dpage 2

The motion is based on the declaration of Vladimir Verhovskoy, Esq. and the memorandum of points and authorities served and filed herewith and on the papers and records on file herein.

Dated: September 9, 1999

VLADIMIR VERHOVSKOY, Attorney for Defendant and Appellant DIMITRI VALERYEVICH TATARINOV

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DIMITRI VALERYEVICH TATARINOV, Defendant and Appellant.	NO. D 027293 SUPER CT NO. SCD 119330

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant and Appellant DIMITRI VALERYEVICH TATARINOV respectfully submits the following memorandum of points and authorities in support of his motion to set aside dismissal and to reinstate appeal.

I.

STATEMENT OF THE CASE

Appellant was tried by jury for charges of violations of Penal Code section 211 [robbery] and Penal Code section 148, subdivision (a) [resisting an officer] arising out of an incident at Nordstrom's Department Store in La Jolla, California on March 6, 1996. On August 12, 1996, the jury delivered verdicts of guilty as to the robbery charge (Count I of

the Amended Information) and not guilty as to resisting an officer (Count II of the Amended Information). At sentencing, on September 10, 1996, appellant was granted probation with imposition of sentence suspended for three years. As conditions of probation, appellant was ordered to be committed to the custody of the Sheriff for 270 days (with 87 days' credit), to pay a fine of $200.00, and to pay restitution in the amount of $200.00. On October 25, 1996, defendant filed his Notice of Appeal. The Clerk's Transcript was forwarded on November 25, 1996, followed, shortly thereafter, by the Reporter's Transcript. Because appellant failed to file a brief after notice pursuant to rule 17(a) of the California Rules of Court, the appeal was dismissed on April 28, 1997.

II.

THIS COURT SHOULD GRANT THE REQUESTED RELIEF FROM DEFAULT BECAUSE THE DEFAULT OCCURRED THROUGH NO FAULT OF APPELLANT AND THIS APPLICATION IS ACCOMPANIED BY AN ATTORNEY'S AFFIDAVIT OF FAULT

Rule 45(e) of the California Rules of Court authorizes the reviewing court to relieve a party from a default caused by the failure to comply with the Appellate Rules of Court. Case law provides that an applications for relief from default in filing a brief is based on mistake, inadvertence, surprise, or neglect, similar to an application under section 473 of the Code of Civil Procedure (*Sanders* v. *Warden* (1951) 106 Cal.App.2d 707, 708; *Clinton* v. *Shaw* (1943) 57 Cal.App.2d 630, 633-634).

Section 473 of the Code of Civil Procedure provides, among other things, that whenever an application for relief is accompanied by an attorney's affidavit of fault, relief from default is mandatory. If the attorney is willing to take the blame, the court must set aside the default. The client's interests are protected and the culpable attorney avoids a potential malpractice action or disciplinary proceeding (see *Beeman* v. *Burling* (1990) 216 Cal.App.3d 1586, 1604). Moreover, there is no requirement that the attorney's mistake, inadvertence, or neglect be excusable. Relief must be granted even where the default resulted from inexcusable neglect by the defendant's attorney (*ibid.*). The court is not concerned with the reasons for the attorney's mistake (*Billings* v. *Health Plan of America* (1990) 225 Cal.App.3d 250).

Financial distress and illness of counsel were found to be sufficient grounds for relief from the appellant's default in failing to timely file the opening brief in *Ventura County Title Co.* v. *Constance* (1936) 7 Cal.2d 684, 684-685). As the attached declaration shows, appellant's counsel in this case was experiencing similar problems.

In addition to the judicial policy of favoring hearings of appeal on the merits (*Haskins* v. *Crumley* (1957) 152 Cal.App.2d 64, 66), the most important concern is the preservation of an innocent (as to the default) appellant's right to appeal. The supreme court reinstated the appeal in *In re Martin* (1962) 58 Cal.2d 133, when it was established that appellant had not known of the dismissal or likelihood of dismissal due to the inaction of his trial counsel. Likewise in *In re Serrano* (1995) 10 Cal.4th 447, where the defendant's family had paid a substantial fee to an attorney, but the attorney had done nothing to prepare the brief.

Finally, it should be noted that granting of the relief requested herein has taken on new urgency for appellant in that, having completed the required period of custody as a condition of probation, appellant is now in deportation proceedings and under the complete control of the Immigration and Naturalization Service. The draconian nature of the current federal immigration laws has forced individuals subject to these regulations to look to state courts as a last resort to ease their plight. Needless to say, deportation would have truly devastating effects on appellant, including the breakup of his marriage, loss of his business, and the potential for persecution in his native Russia.

III.

CONCLUSION

As the foregoing shows, appellant is entitled to the requested relief; and, because denial thereof would result in appellant facing a punishment grossly disproportionate to the crime appellant was convicted of, this court should exercise its discretionary and equitable powers and grant the instant motion.

Respectfully submitted,

Vladimir Verhovskoy

VLADIMIR VERHOVSKOY, Attorney for Defendant and Appellant DIMITRI VALERYEVICH TATARINOV

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DIMITRI VALERYEVICH TATARINOV, Defendant and Appellant.	NO. D 027293 SUPER CT NO. SCD 119330

DECLARATION OF VLADIMIR VERHOVSKOY, ESQ.

I, the undersigned, declare as follows:

1. I am an attorney at law duly licensed and admitted to practice in the State of California and am the attorney of record for DIMITRI VALERYEVICH TATARINOV, the defendant and appellant herein.

2. On April 28, 1997, appellant's appeal was dismissed for failure to timely file an opening brief. Entry of said dismissal was the result of my mistake, inadvertence, surprise and/or neglect as more fully set forth below.

3. I represented appellant at his trial which resulted in a guilty verdict on one of the counts appellant had been charged with on August 12, 1996. After sentencing on September 10, 1996, I timely filed a Notice of Appeal on October 25, 1996, and the record

on appeal was perfected in a timely fashion as well.

4. Notwithstanding the foregoing, I failed to file appellant's opening brief, which resulted in an entry of dismissal on April 28, 1997. This failure on my part was due to financial and medical catatrophes.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: September 9, 1999

Vladimir Verhovskoy

VLADIMIR VERHOVSKOY, Attorney for Defendant and Appellant DIMITRI VALERYEVICH TATARINOV

FROM DISTRICT COURT DOCUMENT 1

Court of Appeal Order Dated September 24, 1999

Exhibit E to the Federal Habeas Petition

Consisting of page E-1 of Doc 1

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff-Respondent
v.
TATARINOV, DIMITRI VALERYEVICH
Defendant-Appellant
D027293
San Diego County No. SCD119330

THE COURT:

Appellant's Motion to Set Aside Dismissal and to Reinstate Appeal filed on September 9, 1999 is DENIED.

Haller
Acting Presiding Justice

cc: All Parties

FROM DISTRICT COURT DOCUMENT 1

CaliforniaSuperior Court Minute Orders

Exhibit F to the Federal Habeas Petition

Consisting of pages F-1 through F-3 of Doc 1

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

CASE SCD119330 DA P7244201 BKG 96116303A

DATE 04-13-00 AT 10:00 a.m. IN DEPARTMENT MFA

JUDGE: HON. DAVID M. SZUMOWSKI

CLERK: FRANCES L. MERCER

REPORTER: FRANK BODDEN, CSR # 2621
REPORTER'S ADDRESS: P.O. BOX 120128, SAN DIEGO, CA 92112-0128

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF.

DUSEK, JEFF B., Deputy District Attorney
COUNSEL FOR THE PEOPLE

vs.

DIMITRI VALIRAVICH TATARINOV, DEFENDANT.

VERHOVSKOY, VLADIMIR, Retained
COUNSEL FOR THE DEFENDANT

VIOLATIONS

Ct(s): Ct. 1 PC211**

PC1203.03 RETURN

The defendant is present.

SPONTANEOUS MOTIONS

The defendant makes a motion for relief pursuant to PC1203.4. The motion is denied.

CUSTODY STATUS

The defendant is to remain at liberty on probation.

OTHER

Defense counsel indicates that the defendant does not require an interpreter. The court excuses the Russian interpreter.

Defense motions the court for probation to revert to summary, motion is GRANTED.

Defense motions the court to permit the defendant to leave the country, motion is GRANTED.

EXHIBIT F page 1

Page: 1 of 1

ORIGINAL

Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

CASE SCD119330 DA P7244201 BKG 96116303A

DATE 11-03-00 AT 10:00 a.m. IN DEPARTMENT MFA

JUDGE: HON. DAVID M. SZUMOWSKI

CLERK: COLLEEN LEWIS

REPORTER: ALEXANDER, LYNN, CSR # 4489
REPORTER'S ADDRESS: P.O. BOX 120128, SAN DIEGO, CA 92112-0128

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF,

COUNSEL FOR THE PEOPLE: HELLSTROM, PER, Deputy District Attorney

vs.

DIMITRI VALIRAVICH TATARINOV, DEFENDANT,

COUNSEL FOR THE DEFENDANT: VERHOVSKOY, VLADIMIR, Retained

PROBATION OFFICER: JACKIE RIVERA

VIOLATIONS

Ct(s): Ct. 1 PC211**

PROB MODIFICATION HG

The defendant is present.

A Probation Modification Hearing is held. The modification(s) requested is/are as follows: terminate probation. Motion denied.

CUSTODY STATUS

The defendant is to remain at liberty on probation.

EXHIBIT F page 2

Page: 1 of 1

ORIGINAL

Judge of the Superior Court

CD117330 DA P7244201 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

10-19-98 AT 01:30 M. 96116303 SENT AFTER REVOCATN

DEPT: HON MICHAEL D. WELLINGTON JUDGE PRESIDING DEPARTMENT 008

C. Yen REPORTER JULIA K. GILL 3524 CSR#

REPORTER'S ADDRESS: P.O. BOX 128, SAN DIEGO, CA 92112-4104

THE PEOPLE OF THE STATE OF CALIFORNIA VS. D. [illegible] DEPUTY DISTRICT ATTORNEY

STARINOV DIMITRI VALIEVICH R ~~R. KATZMAN~~ V. VERHOVSKOY

DEFENDANT ATTORNEY FOR DEFENDANT (PD/APD/PCC/RETAINED)

VIOLATION OF PC211 ** CT.I D. Powell DPO

INTERPRETER Glenn Serebryakov OATH ON FILE/SWORN

LANGUAGE Russian

DEFENDANT ☒ PRESENT ☐ NOT PRESENT.

☐ DEFENDANT ADVISED OF RIGHTS AND ADMITS/DENIES A VIOLATION OF PROBATION ☐ WAIVES HEARING.

PROBATION IS: FORMALLY/SUMMARILY ☐ REVOKED ☒ REINSTATED ☐ MODIFIED ☒ CONTINUED ☒ ST&C ☒ EXTENDED TO: 10.18.02

☐ WAIVES ARRAIGNMENT. ☐ ARRAIGNED FOR JUDGMENT. ☐ IMPOSITION/EXECUTION OF SENTENCE IS SUSPENDED.

☐ PROBATION IS: ☐ DENIED ☐ GRANTED ______ YEARS (FORMAL/SUMMARY) TO EXPIRE ______.

☐ COMMITMENT TO SHERIFF FOR ______ DAYS. STAYED TO: ______. ☐ ADULT INST. RECOMMENDED. ☐ PAROLE NOT TO BE GRANTED.

☐ PERFORM ______ HRS/DAYS PSP/VOL. WORK AT NONPROFIT ORG. SUBMIT PROOF TO PROBATION/COURT BY ______.

☐ FOURTH AMENDMENT WAIVER OF PERSON/AUTO/RESIDENCE/PERSONAL EFFECTS. ☐ SHORT TERM WORK FURLOUGH, REPORT: ______.

☐ UPON COMPLETION OF CUSTODY, DEFENDANT RELEASED TO U.S.I.N.S./UPON DEPORTATION, FORMAL PROBATION REVERTS TO SUMMARY.

☐ FURTHER CONDITIONS ARE SET FORTH IN PROBATION ORDER. ☐ VEHICLE INTERLOCK DEVICE (VC 23235/23246).

☐ DEFENDANT IS COMMITTED TO THE DEPARTMENT OF CORRECTIONS ☐ PER PC 1170(d).

☐ DEFENDANT IS COMMITTED TO THE CALIFORNIA YOUTH AUTHORITY ☐ PER WI 1737

☐ FOR ______ LOWER/MIDDLE/UPPER TERM OF ______ YEARS/MONTHS/TO LIFE

ON COUNT ______ CODE & NO. ______ ☐ PRINCIPAL COUNT.

☐ NO VISITATION, PER PC 1202.05. VICTIM IS UNDER 18 YRS. OF AGE. DA TO COMPLY WITH NOTICES.

☐ DEFENDANT IS ADVISED REGARDING PAROLE/APPEAL RIGHTS.

☐ REGISTRATION PER PC 290/HS 11590/PC 457.1. ☐ TESTING PER PC 1202.1

☐ CIRCUMSTANCES IN MITIGATION/AGGRAVATION OUTWEIGH THOSE IN MITIGATION/AGGRAVATION.

☐ RESTITUTION FINE OF $ ______ PER PC 1202.4(b). ☐ FORTHWITH PER PC 2085.5.

☐ RESTITUTION FINE OF $ ______ PER PC 1202.45 SUSPENDED UNLESS PAROLE IS REVOKED.

☐ FINE OF $ ______ PLUS PENALTY ASSESSMENT. ☐ RESTITUTION OF $ ______ TO VICTIM(S) PER P.O.'S REPORT/REST. FUND PER PC 1202.4(f).

☐ AT $ ______ PER MONTH. ☐ COMBINED RATE. TO START 60 DAYS AFTER RELEASE/ON ______ THROUGH REVENUE AND RECOVERY.

☐ DEFENDANT TO PAY PRE-PLEA INVESTIGATION AND REPORT PREPARATION COSTS. ☐ DEFENDANT TO PAY BOOKING FEES.

☐ REFERRED TO REVENUE AND RECOVERY. ☐ COURT APPOINTED ATTORNEY FEES ORDERED IN THE AMOUNT OF $ ______.

CREDIT FOR TIME SERVED
______ DAYS LOCAL
______ DAYS STATE INST.
______ DAYS PC 4019/2933.1
______ TOTAL DAYS CREDIT

☐ DEFENDANT REMANDED TO CUSTODY OF SHERIFF. ☐ WITHOUT BAIL. ☐ WITH BAIL SET AT $ ______.

☐ DEFENDANT ORDERED RELEASED FROM CUSTODY. ☐ ON PROBATION. ☐ ON OWN/SUPERVISED RECOGNIZANCE. ☐ THIS CASE ONLY.

☒ DEFENDANT TO REMAIN AT LIBERTY. ☐ ON BOND POSTED $ ______. ☒ ON PROBATION. ☐ ON OWN/SUPERVISED RECOGNIZANCE.

☐ DEFENDANT WAIVES STATUTORY TIME FOR PRONOUNCEMENT OF JUDGMENT.

☐ DEFENDANT REFERRED FOR DIAGNOSTIC EVALUATION. ☐ PER PC 1203.03. ☐ PER WI 707.2.

______ CONTINUED TO/SET FOR ______ AT ______ M. IN DEPT. ______ ON MOTION OF COURT/DDA/DEFENDANT/PROBATION OFFICER. REASON:

☐ BENCH WARRANT TO ISSUE, BAIL SET AT $ ______. ☐ SERVICE FORTHWITH. ☐ ORDERED WITHHELD TO ______.

☐ BENCH WARRANT ISSUED/ORDERED ______ IS RECALLED/RESCINDED.

☐ BAIL IS ☐ EXONERATED. ☐ FORFEITED. AMOUNT $ ______. BOND NO. ______

BOND COMPANY ______ AGENT ______

☐ PROCEEDINGS SUSPENDED ☐ PER PC 1368, MENTAL COMPETENCY. (SEE BELOW FOR DATES OF EXAMINATION AND HEARING.)

☐ PER WI 3051, ADDICTION OR DANGER OF ADDICTION. (SEE BELOW FOR SERVICE DATE OF PETITION AND ORDER.)

☐ SUPPLEMENTAL REPORT ORDERED. ☐ REPORT TO REGISTRAR OF VOTERS. ☐ DMV ABSTRACT. B.A.C. ______

(X) Deft waives interpreter. Court finds good cause to use interpreter for sentencing purposes.

(X) Condition (F) and (G) on "order after hearing" are deleted by Court.

M D Wellington

JUDGE OF THE SUPERIOR COURT

EXHIBIT F

page 3

CR-28(Rev. 4-98) CRIMINAL MINUTES

FROM DISTRICT COURT DOCUMENT 1

Letter Dated December 22, 2000 from Attorney Verhovskoy

Exhibit G to the Federal Habeas Petition

Consisting of pageG-1 of Doc 1

Post Office Box 620129
San Diego, CA 92162-0129 USA
Tel: 619 702-5852 Fax: 619 702-5853
E-mail: lawtech@pacbell.net

LawTech International

December 22, 2000

Mr. Dimitri Tatarinov
Mrs. Patricia Lynn Jacks
5790 Friars Rd, #F8
San Diego, CA 92110

Dear Dimitri and Pat:

Subject: Notice of Withdrawal as Attorney of Record before the Immigration & Naturalization Service

Please be advised that I am withdrawing from representation of your interests before the U.S. Immigration and Naturalization Service, as, likewise, from all other criminal matters.

Your next hearing before the INS court is on March 8, 2001. Pleadings for that hearing are due by February 7, 2001.

All files are being assembled for your personal use and/or transfer to alternate counsel. I will arrange to have all file materials delivered to you not later than January 3, 2001, or other counsel you may designate before that time. This will give you or your new attorney ample and more than adequate time to prepare for the March 8 hearing.

Thank you, happy holidays, and I will you success in this and all other matters in the coming new year.

Sincerely,

Vladimir Verhovskoy, Esq.
Cal. Bar No. 97039

FROM DISTRICT COURT DOCUMENT 1

Subpoena Issued by the State Bar of California
for File in Superior Court Case SCD119330

Exhibit H to the Federal Habeas Petition

Consisting of page H-1 of Doc 1

THE STATE BAR OF CALIFORNIA
OFFICE OF THE CHIEF TRIAL COUNSEL

SUBPOENA

01-1277

(California Business and Professions Code Sections 6049 to 6052 and 6069)

In the Matter of

A State Bar Investigation

Case No. 01-O-00503

COURT FILE SUBPOENA

FILED
STEPHEN THUNBERG
Clerk of the Superior Court
JUN 28 2001
By: B. Lindahl, Deputy

THE STATE BAR OF CALIFORNIA, TO: Clerk, San Diego Superior Court

1. **YOU ARE ORDERED TO APPEAR TO TESTIFY AS A WITNESS** in this proceeding at the following time and place:

DATE: JULY 9, 2001 **TIME:** 3:00 P.M.

PLACE: THE STATE BAR OF CALIFORNIA
OFFICE OF THE CHIEF TRIAL COUNSEL
ATTENTION: **CONCHA CUELLAR-ROQUE**
1149 SOUTH HILL STREET
LOS ANGELES, CALIFORNIA 90015-2299
TELEPHONE: (213) 765-1156

Mail to ↑

2. **YOU ARE FURTHER ORDERED AS FOLLOWS:**

You are ordered to produce the documents and things described below:

Court file name: **People v. Dmitri Tatarinov**

Court file No. **SCD119330**

PLEASE SEND CERTIFIED COPY OF DOCKET SHEET

3. You are not requested to appear in person; however, you are ordered to produce true, legible, and durable certified copies of the above-described documents, in lieu of personal appearance.

4. The records are to be produced by the date and time shown above in paragraph 1.

5. **IF YOU HAVE ANY QUESTIONS ABOUT THIS SUBPOENA, YOU MAY CONTACT CONCHA CUELLAR-ROQUE BEFORE THE DATE ON WHICH YOU ARE TO APPEAR AT 213-765-1156. DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT OF COURT IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.**

Date issued: June 4, 2001

Dane C Dauphine

Dane Dauphine
Deputy Trial Counsel

EXHIBIT H page 1

H:\Work\Melissa\SCD11930\Sub-L.wpd\fdt

FROM DISTRICT COURT DOCUMENT 1

Copy of Order Denying Motion to Recall Remittitur, Vacate Dismissal and Reinstate Appeal, Filed September 20, 2001

Exhibit "I" to the Federal Habeas Petition

Consisting of page I-1 of Doc 1

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff-Respondent
v.
TATARINOV, DIMITRI VALERYEVICH
Defendant-Appellant
D027293
San Diego County No. SCD119330

THE COURT:

Appellant's motion to recall remittitur, vacate dismissal and reinstate appeal filed on August 30, 2001, is DENIED.

Presiding Justice

cc: All Parties

FROM DISTRICT COURT DOCUMENT 1

Copy of Order Denying Petition for Review of Motion to RecallRemittitur, Vacate Dismissal and Reinstate Appeal, Filed December 12, 2001

Exhibit J to the Federal Habeas Petition

Consisting of pageJ-1 of Doc 1

Court of Appeal, Fourth Appellate District, Division One - No. D027293
S101020

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

DIMITRI VALERYEVICH TATARINOV, Defendant and Appellant.

Petition for review DENIED.

GEORGE
Chief Justice

FROM DISTRICT COURT DOCUMENT 1

Copy of Order of California Court of Appeal
Denying Petition for Writ of Habeas Corpus
Filed June 25, 2002

Exhibit K to the Federal Habeas Petition

Consisting of page K-1 of Doc 1

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re DIMITRI VALERYEVICH TATARINOV on Habeas Corpus.	D039562 (San Diego County Super. Ct. No. SCD 119330)

THE COURT:

The petition for writ of habeas corpus and response have been read and considered by Justices Benke, Huffman and McConnell.

Petitioner has failed to present a prima facie case to set aside the dismissal and reinstate the appeal. Further, petitioner has not shown prejudice flowing from counsel's performance or lack thereof. (*Strickland v. Washington* (1984) 466 U.S. 668, 691-692.) Also, habeas corpus does not serve as a substitute for appeal. Absent special circumstances that excuse a failure to raise issues on appeal, such failure generally precludes review in a post conviction petition for writ of habeas corpus. (*In re Harris* (1993) 5 Cal.4th 813, 829.)

The petition is denied.

McCONNELL, Acting P. J.

Copies to: All parties

FROM DISTRICT COURT DOCUMENT 1

Copy of Order of California Supreme Court
Denying Petition for Review of Writ of Habeas Corpus.
Filed August 28, 2002

Exhibit L to the Federal Habeas Petition

Consisting of page L-1 of Doc 1

Court of Appeal, Fourth Appellate District, Division One - No. D039562
S108092

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re DIMITRI VALERYEVICH TATARINOV on Habeas Corpus

Petition for review DENIED.

SUPREME COURT
FILED

AUG 2 8 2002

Frederick K. Ohlrich Clerk

DEPUTY

GEORGE

Chief Justice

FROM DISTRICT COURT DOCUMENT 1

Copy of Argument from the Federal Petition for Writ of Habeas Corpus Explaining Tolling Pursuant to 28 U.S.C. Section 2244(d)(1)

Consisting of pages 18 through 20 of Doc 1

tioner placed great reliance on Verhovskoy's legal advice. The attorney-client relationship was particularly strong because Verhovskoy could communicate with petitioner in Russian, petitioner's first language. Exhibits A and B. On December 24, 2000, petitioner received a letter from Verhovskoy. It tersely said Verhovskoy would no longer represent petitioner. It advised petitioner to retain other counsel. The letter provided no explanation. Exhibit G. On January 19, 2001, petitioner received a notice from the California State Bar indicating Verhovskoy was "suspended from the practice of law in the State of California for a period of sixty (60) days." Petitioner thereafter retained James R. Patterson to represent him in the immigration matter. Exhibit A, p. 3.

The date of December 24, 2000, is the earliest date that could trigger the provisions of 28 U.S.C. § 2244(d)(1)(D), the day on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. Prior to that time, petitioner was unduly influenced by Verhovskoy's legal advice, which made it a practical impossibility for petitioner to discern Verhovskoy's incompetent representation. It would be reasonable to choose January 2, 2001, as the date from which the statute commenced to run because it would have been quite difficult for petitioner to obtain new legal counsel during the holiday season.

During the one-year period that commenced January 2, 2001, the statute of limitations in 28 U.S.C. § 2244(d)(1) was tolled for substantial periods of time pursuant to the provisions of 28 U.S.C. § 2244(d)(2). That subsection provides, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." From the date of January 2, 2001, the statute ran for a period of 240 days commencing January 2, 2001 and concluding August 29, 2001.

On August 30, Attorney Wallingford filed a "Motion to Recall Remittitur, Vacate Dismissal and Reinstate Appeal." The California Court of Appeal denied the motion in an order dated September 20, 2001. Exhibit "I". Petitioner then filed a timely petition for review in the Califomia Supreme Court. It was considered as case S101020 and denied December 12, 2001. Exhibit J. That motion tolled the AEDPA statute of limitations between those dates.

In *Artuz v. Bennett*, 531 U.S. 4, 148 L.Ed.2d 213, 121 S.Ct. 361 (2000), the United States Supreme Court considered whether a prisoner's pro se motion to vacate his judgment of conviction could toll the statute of limitations under 28 U.S.C. § 2244(d)(2). The Court stated that "an application is `properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee." *Artuz v. Bennett*, 531 U.S. *supra,* at p. 8 (emphasis omitted) (footnote omitted). "[T]he question whether an application has been `properly filed' is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." *Id.* at 9 (emphasis omitted). Thus, the Court upheld the Second Circuit's determination that the statute of limitations was tolled during the time when the state court was considering the prisoner's motion to vacate his conviction, despite the fact that the claims in the motion were procedurally barred under New York law. *Artuz v. Bennett*, 531 U.S. at pp. 7-8, *supra.* Likewise, in *Tillema v. Long,* 253 F.3d 494 (9th Cir. 2001) the Ninth Circuit held that a pro per defendant's motion to vacate illegal sentence, filed in the California courts, tolled the one-year statute even though the motion did not include an issue subsequently raised on federal habeas corpus. *Tillema v. Long,* 253 F.3d at pp. 498-499.

If the motions in *Artuz v. Bennett* and *Tillema v. Long* tolled the running of the statute of limitations, there can be no question that petitioner's motion likewise tolled the statute. Tolling extends for the full period the motion is properly before the state court system, from the initial filing in the lower court to denial of a timely filed petition for review. 28 U.S.C. 2244(d)(2) and see *Nino v. Galaza* 183 F.3d 1003, 1006 (9th Cir. 1999).

The statute of limitations in section 2244(d)(1) commenced to run again on December 13, 2001, the day after the California Supreme Court denied the petition for review in case S101020. It ran for 64 days to February 14, 2002. On February 15, 2002, petitioner filed his petition for writ of habeas corpus in the Court of Appeal, case D039562. On June 25, 2002, the Court of Appeal filed its decision denying the petition for review. Exhibit K. On July 3, 2002, petitioner filed a timely petition for review in the California Supreme Court from denial of the petition for writ of habeas corpus. It was considered as case S108092 and denied August 28, 2002. Exhibit L. That petition for writ of habeas corpus again tolled the statute of limitations in 28 U.S.C. 2244(d)(1) while it was pending in the state courts. 28 U.S.C. § 2244(d)(2) and see *Nino v. Galaza,* 183 F.3d at p 1006, *supra,* and *Tillema v. Long,* 253 F.3d at p. 502, *supra.* The statute of limitations again commenced to run on August 29, 2002. Prior to that date, the statute had already run for a period of 304 days between January 2, 2001 and August 29, 2001, and again between December 13, 2001 and February 14, 2002. Therefore, the last day for filing this petition for writ of habeas corpus will be October 28, 2002. As explained above, that date is based on the statute commencing to run on January 2, 2001. Even if the court determines that the statute commenced running on December 24, 2000, the last day for filing would be October 18, 2002.

FROM DISTRICT COURT DOCUMENT 1

Copy of Argument from the Federal Petition for Writ of Habeas Corpus
Explaining How Petitioner Was Prejudiced by
Trial Counsel's Ineffective Assistance

Consisting of pages 24 through 35 of Doc 1

in case D027293. A criminal defendant is entitled to effective assistance of counsel on appeal. *Evitts v. Lucey,* 469 U.S. 387, 83 L.Ed.2d 821, 105 S.Ct. 830 (1985). The most basic duty required of appellate counsel involves preparation and filing of a legal brief setting forth all arguable issues that advance the client's position. *Doyle v. United States,* 721 F.2d 1195, 1198 (9th Cir. 1983). Attorney Verhovskoy utterly failed to perform that duty, causing petitioner's appeal in case D027293 to be dismissed on procedural grounds. A claim of ineffective assistance of appellate counsel is cognizable in a habeas corpus proceeding. *Murray v. Carrier,* 477 U.S. 478, 488, 91 L.Ed.2d 397, 106 S.Ct. 2639, 2645 (1986).

2. <u>Petitioner was prejudiced by counsel's failure to act because petitioner had meritorious legal issues to present on appeal.</u>

a) On appeal, petitioner could have successfully argued that the trial court committed error by failing to instruct the jury that petitioner had a right to use a reasonable amount of force to resist an excessively forceful citizen's arrest.

Petitioner could have obtained substantial relief on appeal had Attorney Verhovskoy provided competent professional assistance. Petitioner was convicted of robbery on an *Estes* theory. *People v. Estes,* 147 Cal.App.3d 23, 27-28 (1983)(robbery conviction affirmed where defendant shoplifted merchandise from Sears store and then assaulted a security guard who tried to apprehend him in the store parking lot). At trial, testimony presented by the prosecution and the defense provided conflicting descriptions of the fight that occurred between petitioner and Nordstrom security agents in the parking lot. Nordstrom agents said petitioner assaulted them after they asked him to return to the store. RT pp. 69-71, 92-95, 134-135, 276. Conversely, petitioner said he walked peacefully to his car. When he started to open it, a Nordstrom agent jumped on him from behind, grabbed his neck and said, "we just want to talk to you." Petitioner was thrown onto the trunk of his car and then to the

ground. The agent continually applied force until petitioner was handcuffed. R.T. pp. 369-374, 410-412.

The jury's resolution of that factual conflict was important, because it created the basis for the robbery conviction in count one. If petitioner stole merchandise from the store and then used force in the parking lot to avoid apprehension, the crime was robbery. *People v. Estes, supra,* 147 Cal.App.3d at pp. 27-28. However, if petitioner used reasonable force only to defend himself against an unlawful use of force by Nordstrom agents, he was not guilty of robbery. To support that defense, petitioner needed a jury instruction explaining that he could lawfully use reasonable force to repel excessive force applied by Nordstrom agents who arrested him.

Petitioner's trial counsel explained at the jury instruction conference that he would defend against the robbery charge by arguing that petitioner used force to resist excessive force applied by the Nordstrom agents in making the citizen's arrest. Counsel told the court:

> [T]he defense there, your honor, was that [the Nordstrom agents] were doing something. They had no right to physically restrain the defendant. He had a right to defend himself. That was not a lawful arrest.

Emphasis added, R.T. p. 261, also see p. 266. Counsel added:

> [The Nordstrom agents] were instigating and creating the physical confrontation."

Ibid.

The trial court recognized that a basic issue presented to the jury for decision involved the difference between petty theft and robbery. With that in mind, the court gave the jury a number of special instructions explaining the difference between those two offenses. The court erred by failing to include in those instructions language that explained petitioner's right to use a reasonable

amount of force to defend against excessive force by the Nordstrom agents. [3] Petitioner's trial counsel told the court at the jury instruction conference that

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3 The trial court gave standard instructions defining robbery and petty theft using CALJIC Nos. 9.40 [robbery defined], 9.40.2 [robbery – after acquired intent], 9.41 [robbery – fear – defined], and 9.43 [second-degree robbery as a matter of law], 14.02 [petty theft – defined]. (CT pp. 80-83, 96.) In addition, the court gave the following instructions that related to the distinction between robbery and petty theft:

SPECIAL JURY INSTRUCTION: "Mere theft becomes robbery if the perpetrator, having gained possession of the property without the use of force or fear, resorts to force or fear while carrying away the loot. ¶ In other words, when property is taken with the specific intent to steal but without the use of threat or force or fear and thereafter force or fear is used to prevent the owner from recovering the property, however temporarily, or to facilitate an escape, the crime of robbery is committed. ¶ A slight movement is sufficient for the element of taking. ¶ The robber's escape with the loot is not a necessary element of the crime of robbery. ¶ Robbery does not require that the loot be carried away after the use of force of [sic] fear. (CT p. 84.)

"MERCHANT'S PRIVILEGE" INSTRUCTION: "A merchant may detain a person for a reasonable time for the purpose of conducting an investigation in a reasonable manner whenever the merchant has probable cause to believe the person to be detained is attempting to unlawfully take or has unlawfully taken merchandise from the merchant's premises. ¶ In making the detention the merchant may use a reasonable amount of nondeadly force necessary to protect himself or herself and to prevent escape of the person detained or the loss of tangible or intangible property. ¶ As used in this section: ¶ 'Merchandise' means any personal property, capable of manual delivery, displayed, held or offered for retail sale by a merchant. ¶ 'Merchant' means an owner, operator, and the agent, consignee, lessee or officer of an owner or operator, of any premises used for the retail purchase or sale of any personal property capable of manual delivery." (CT p. 92.)

UNTITLED SPECIAL INSTRUCTION: "The excessive or unreasonable force instructions do not apply to Nordstrom personnel. They apply only to Count 2, the charge of resisting arrest by a Peace Officer, Penal Code Section 148. ¶ However, as the instructions indicate, the crime of robbery requires that the taking be accomplished by force or fear. Thus, the element of force or fear required for robbery must be to facilitate the taking of stolen property, either to prevent the owner from recovering the prop-

petitioner would defend the robbery charge on a theory that any force he used against Nordstrom agents in the parking lot was a lawful response to excessive force by the Nordstrom agents in making the arrest. RT p. 261. Trial counsel tried hard to get instructions on that point of law. During the jury instruction conference he explained to the court that "robbery involves the use of force or fear to take the property. Here the force we are arguing was in self-defense and protection of his own self and vehicle but he had an absolute right to physically defend himself." RT p. 266.

The court told trial counsel he could argue that to the jury, implying the court would not give an instruction to that effect. *Ibid.* Counsel persisted, saying, "... [T]he defendant had an absolute right to use force. He was being precluded from entering his car. He had no duty to submit to that physical arrest." *Ibid.*

Counsel resumed his argument during a subsequent discussion of jury instructions. At that time, he submitted CALJIC No. 9.60, which defines the crime of false imprisonment by force. Counsel said:

> [T]his was my attempt, as the People's counsel said, "loose attempt," or best attempt over the course of the evening to come up with an alternate to our discussion in chambers of addressing the issue of the rights of a private citizen, security agent, in using force to arrest someone and hold him against his will, including the defendant's right to resist that confinement.

RT pp. 490-491. The court noted that CALJIC 9.60 seemed inappropriate, since it defines the crime of false imprisonment. RT p. 491. Trial counsel re-

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erty or to escape apprehension for the theft." CT p. 93. This instruction necessarily referred to CALJIC Nos. 9.26 and 9.28. Those instructions said that a person arrested by a peace officer may use reasonable force to defend himself if the peace officer uses excessive force in making the arrest. CT pp. 89, 90.

plied that he modified the instruction so it did not appear to charge the Nordstrom agents with a crime. He said, "what I am trying to accomplish by this is to show that there is possible misconduct here on the part of agents and the right of defendant to defend himself." R.T. p. 491, and see CT pp. 52-53. The court declined to give the modified version of CALJIC No. 9.60. RT pp. 491-492.

The trial court had a duty under California law to give a sua sponte instruction telling the jury petitioner had that right. The California Supreme Court has long held that trial courts have a sua sponte duty to instruct on all material issues presented by the evidence. The duty extends to defenses as well as to lesser-included offenses. *People v. Breverman,* 19 Cal.4th 142, 157 (1998). However, a distinction is drawn between the two situations. In the case of defenses, a sua sponte instructional duty arises only if it appears the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case. *People v. Breverman, supra,* 19 Cal.4th at p. 157, *People v. Elize,* 71 Cal.App.4th 605, 611, 615 (1999).

In petitioner's case, it was crystal clear that petitioner relied on a defense theory that he used force in the parking lot to repel excessive force applied by the Nordstrom agents, and not to commit robbery. Trial counsel repeatedly expressed reliance on that theory, both at the jury instruction conference and in his argument to the jury. R.T. pp. 261, 266, 490-491, 754-755. Trial counsel argued to the jury, without the aid of instructional support, that:

> [t]he force was not associated with the taking. It was not associated with the taking. It was not used to accomplish the taking, as the law requires. Whatever force or fear there may have been, we would submit was a lawful resistance to an unlawful arrest, to an excessive, unreasonable use of force."

Emphasis added, RT pp. 754-755. Likewise, petitioner asserted that theory in his testimony. He testified that Nordstrom agents initiated combat in the parking lot by jumping on his back and continuously applying force until he was handcuffed. RT pp. 372-374, 410-412. Thus, petitioner clearly relied on this defense. The jury should have received instructions that would have authorized it to use this theory to decide whether petitioner's use of force in the parking lot was lawful resistance to use of excessive force by the Nordstrom agents.

Appropriate language for a sua sponte instruction was readily available. In conjunction with the section 148 offense charged in this case, the trial court gave CALJIC No. 9.28 [USE OF EXCESSIVE FORCE BY AN OFFICER]. It says:

> [a] peace officer is not permitted to use unreasonable or excessive force in making or attempting to make an otherwise lawful arrest. ¶ If an officer does use unreasonable or excessive force in making or attempting to make an arrest, the person being arrested may lawfully use reasonable force to protect himself.

CT p. 90. CALJIC No. 9.28 could have been modified by simply substituting the word "citizen" or the words "store security agent" for the words "officer," or "peace officer." In that way, the instruction would have correctly established that petitioner had a right to use reasonable force to resist excessive force employed by the Nordstrom agents in executing the arrest.

The trial court compounded the error when it answered a jury question by saying that the excessive or unreasonable force instructions applicable to peace officers did not apply to the Nordstrom agents. The instruction erroneously implied that petitioner had no right to use force against the Nordstrom agents, even if they used excessive force in arresting him. Immediately after the court instructed the jury, a juror submitted a written question to the court. It said:

> Re resisting arrest element, does the element of excessive force, number 148, apply to the peace officer and the Nordstrom's loss prevention team in the detention of the defendant or just the peace officer?

RT pp. 725-726. This was an important question. It appeared to address petitioner's legal theory that he used force in response to excessive force by the Nordstrom agents, and therefore did not commit robbery.

In discussing the juror's question with the court, trial counsel argued that the peace officer instructions should apply to the Nordstrom personnel because, "I think there is an issue of unreasonable force, making an unlawful arrest. And I think it definitely applies." RT p. 726. Trial counsel was correct. The juror's question addressed the language of CALJIC No. 9.28, discussed above, which says a peace officer cannot use excessive force in making an arrest. It authorizes the person arrested to use reasonable force to resist a peace officer who makes an otherwise lawful arrest with excessive force. The principle set forth in that instruction would necessarily apply equally to a citizen's arrest.

However, the trial court ruled that the legal principle concerning excessive force in making an arrest did not apply to the Nordstrom personnel. RT p. 726. The court stated,

> ...and as our special instruction says, if force or fear is used to prevent the owner from recovering the property, however temporarily or to facilitate escape, then the crime of robbery is committed. But if the force is used for some other reason, such as an unprovoked attack, then it would be relevant.

RT p. 727. The court appeared to be referring to its special instruction that explained the difference between "mere theft" and robbery, which contains some of the language the court used in its explanation. CT p. 84. However, that special instruction did not contain language saying, "if the force is used for some other reason, such as an unprovoked attack..." *Ibid.*

It appears the trial court failed to understand the relevance of an instruction telling the jury that petitioner could lawfully use reasonable force to repel a citizen's arrest involving excessive force. The jury needed to know that it would be lawful for petitioner to use a reasonable amount of force, even if he had actually stolen a jacket in the store, if the Nordstrom agents used excessive force to arrest him in the parking lot.

The court said it would not give the instruction as to the Nordstrom agents because,

> your version of the facts and your argument is that [petitioner] dropped the jacket in the store; he left the jacket in the store and then left. Whatever he did, under your version, was completed at that time. The fact that [the Nordstrom agents] may have gone out there and if they did use excessive force against him, does not apply to whether he committed a petty theft or not.

Emphasis added; RT p. 728 (the court essentially repeated this analysis at RT p. 732). The court's statement reveals a basic misunderstanding of the reason why petitioner needed the instruction. Petitioner needed it to defend against the robbery charge, not petty theft. The jury evidently believed petitioner carried the jacket into the parking lot, and rejected his testimony that he dropped it inside the store. Otherwise, the jury would have found him guilty of attempted petty theft, using a lesser-included offense instruction tied to that factual scenario. CT pp. 94-96, RT pp. 697-698. Assuming the jury believed petitioner left the store with the jacket, however, the question remained whether he used force in the parking lot in an effort to escape with the jacket, or as a reasonable response to an excessively forceful citizen's arrest. Petitioner needed an instruction informing the jury that he could use reasonable force to resist excessive force in effecting the citizen's arrest, even if he actually stole the jacket. That instruction would have let the jury know petitioner could lawfully use force during the arrest without escalating the offense to robbery.

Petitioner was entitled, under California law, to an instruction supporting his defense under that factual scenario. In *People v. Elize, supra,* 71 Cal.App.4th 605, the defendant had a physical struggle with two women. During the struggle he drew a gun which fired one time, nearly injuring one woman. *Id.* at p. 607. The trial court refused to instruct on self-defense because the defendant testified the shooting was accidental. *Id.* p. 610. The appellate court reversed and remanded for a new trial, holding that the self-defense instructions should have been given. The court explained that the jury could have disregarded the defendant's testimony about an accidental shooting and found self-defense from other evidence. It was reversible error to not instruct on self-defense. *Id.* pp. 612, 616. That same rationale applies here. The jury could have rejected petitioner's testimony about dropping the jacket in the store, but believed he used force in the parking lot to repel excessive force by Nordstrom agents. The instruction would have informed the jury that petitioner could lawfully use force in that circumstance.

It was extremely important that the jury understand petitioner could use reasonable force to resist an excessively forceful citizen's arrest. The special instruction distinguishing robbery from "mere theft" said "force ...used to prevent the owner from recovering the property, however temporarily...," would amount to robbery. CT p. 84. If the jury thought petitioner had no lawful right to use force against the Nordstrom agents, the jury would attribute any force he did use against them as force escalating theft to robbery. There would simply be no permissible reason for him to use force. Under the special instruction distinguishing robbery from "mere theft," the impermissible use of force would necessarily result in a verdict finding petitioner guilty of robbery, because it delayed the effort to make the citizen's arrest and recover the property.

Instead of telling the jury that petitioner could use reasonable force to resist an excessively forceful citizen's arrest, the court fashioned and gave the following instruction in response to the juror's question:

> The excessive or unreasonable force instructions do not apply to Nordstrom personnel. They apply only to count 2, the charge of resisting arrest by a Peace Officer, Penal Code Section 148. ¶ However, as the instructions indicate, the crime of robbery requires that the taking be accomplished by force or fear. Thus, the element of force or fear required for robbery must be to facilitate the taking of stolen property, either to prevent the owner from recovering the property or to escape apprehension for the theft. [4]

CT p. 93, RT pp. 734-736. That instruction was defective. It failed to tell the jury that petitioner could lawfully use force against the Nordstrom agents if they used excessive force to arrest him. As explained above, if the jury thought petitioner had no lawful right to use force under any circumstance, petitioner lost any reasonable opportunity to have the jury accept his theory of defending against the robbery charge. Had Attorney Verhovskoy presented this legal argument on direct appeal, it is likely that petitioner would have prevailed. Therefore, petitioner is entitled to relief on habeas corpus.

b) On appeal, petitioner could have successfully argued that the trial court committed error by failing to instruct the jury that the crime of theft is a lesser-included offense within the crime of robbery.

Petitioner was convicted of robbery in count one on a theory that he shoplifted in a Nordstrom department store, then used force against Nord-

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4 Appellant's trial counsel acquiesced in this instruction when asked by the court if it was satisfactory. RT pp. 734-735. This should not be deemed a waiver of the issue concerning instruction on the right to resist an excessively forceful citizen's arrest, however. Petitioner's counsel had argued forcefully for such an instruction immediately prior to the court's ruling. RT pp. 726-731. The court had forcefully told counsel that he was not entitled to the instruction. RT pp. 726-733.

strom security agents when they confronted him outside in the parking lot. The court instructed the jury that attempted petty theft was a lesser-included offense of robbery. CT p. 94. That instruction was predicated on petitioner's testimony that he started to steal a jacket, then dropped it inside the store and left with no stolen merchandise. RT p. 494. The court explained:

> [T]he court feels obligated to give the lesser-included offense instruction of attempted petty theft in this case. The defendant has made a judicial confession on the witness stand that he intended to take the jacket, that he did take the jacket, that he started to walk out with the jacket, and he thought someone was following him, that he then dropped the jacket in the store and went out without the jacket. ¶ Now that is an attempted petty theft. And the court feels obligated to give that instruction and have a verdict form for attempted petty theft, so we will give the instruction on 14.02, which defines theft, the instruction on attempt and then 17.10, which talks about the lesser included offense.

RT p. 494, CT pp. 94-96. The court failed, however, to instruct and provide a verdict form on the lesser-included offense of theft, a violation of section 484. This was error.

The evidence at trial required instruction on the lesser-included offense of theft. If the jury believed that petitioner stole merchandise and took it into the parking lot, the jury had to decide whether that act constituted robbery or theft. If the jury doubted that petitioner used force to facilitate the theft, the jury should not have found petitioner guilty of robbery, but rather the lesser-included offense of theft.

Under California law, theft is a necessarily lesser-included offense within robbery. *People v. Ramkeesoon,* 39 Cal.3d 346, 351 (1985), *People v. Estes, supra,* 147 Cal.App.3d at p. 28. Robbery has the additional element of a taking by force or fear. The trial court had a duty to instruct on theft even in the absence of a request by petitioner. *People v. Ramkeesoon, supra,* 39 Cal.3d at p. 351. A trial court must instruct, sua sponte, on the general principles of

law relevant to issues raised by the evidence. *People* v. *Wickersham,* 32 Cal.3d 307, 323-324 (1982), disapproved on other grounds in *People v. Barton,* 12 Cal.4th 186 (1995). Encompassed within this requirement is the duty to instruct on a lesser-included offense, even if not requested, when the evidence raises a question as to whether all the elements of the charged offense are present and there is evidence that would justify a conviction of the lesser offense. *People* v. *Melton,* 44 Cal.3d 713, 746 (1988).

The necessity for instructions on lesser-included offenses is based on the defendant's constitutional right to have the jury determine every material issue presented by the evidence. *People* v. *Tinajero,* 19 Cal.App.4th 1541, 1547 (1993). Fulfillment of this obligation ensures the jury will consider the full range of possible verdicts - not limited by the strategy, ignorance, or mistakes of the parties. The jury should not be constrained by the fact that the prosecution and defense have chosen to focus on certain theories. *People* v. *Wickersham, supra,* 32 Cal.3d at p. 324. When one of the elements of the offense charged remains in doubt, but the defendant is clearly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction. *People* v. *Ramkeesoon, supra,* 39 Cal.3d at p. 351. Proper instruction on a lesser-included offense avoids an unwarranted all-or-nothing choice for the jury and ensures the verdict is neither harsher nor more lenient than the evidence merits. *People* v. *Wickersham, supra,* 32 Cal.3d at p. 324.

In petitioner's case, the jury needed the option of finding petitioner guilty of theft to accurately determine his culpability. The error in failing to instruct on theft as a lesser-included offense caused a miscarriage of justice. Had Attorney Verhovskoy presented this issue on appeal, it is likely that petitioner would have prevailed. *People* v. *Breverman,* 19 Cal.4th 142, 178, fn. 26 (1998). Therefore, petitioner is entitled to relief on habeas corpus.

DISTRICT COURT DOCUMENT 11

Report and Recommendation of Magistrate Roger T. Benitez
RE: Granting Motion to Dismiss Petition for Writ of Habeas Corpus

16 pages, including Appendix to Report and Recommendation

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DIMITRI V. TATARINOV,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO,

Respondent.

Civil No. 02cv2029-W (BEN)

REPORT AND RECOMMENDATION RE: GRANTING MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

I. INTRODUCTION

Petitioner, Dimitri V. Tatarinov, was tried by a jury in August, 1996 and convicted of second degree robbery. He was sentenced to probation which terminated on October 18, 2002, after the filing of his habeas petition.

Although never incarcerated for the crime, Tatarinov now seeks federal habeas corpus relief from the lingering effects of his conviction pursuant to 28 U.S.C. § 2254. He alleges a single ground for relief. Specifically, he alleges the trial court committed reversible error in giving a jury instruction on self-defense which could have been remedied on appeal. However, he received ineffective assistance of appellate counsel when his retained counsel failed to file an opening brief and his direct appeal was dismissed.

The trial finished on August 12, 1996 and the appeal was dismissed on April 28, 1997 (with the Remittitur issued on July 1, 1997). The instant Petition was filed on October 11, 2002. The Respondent now moves to dismiss arguing that the Petition is barred by the one-year statute of limitations set forth in 28 U.S.C. § 2244(d).

After considering all of the pleadings and relevant lodgements, and for the reasons set forth below, it is recommended that the Motion to Dismiss the Petition for Writ of Habeas Corpus be GRANTED.

II. THE STATUTE OF LIMITATIONS

A. THE AEDPA ONE-YEAR STATUTE OF LIMITATIONS

Respondent contends that the Petition is time barred by the Antiterrorism and Effective Death Penalty Act ("AEDPA").[1] AEDPA amended 28 U.S.C. § 2244 by adding subdivision (d), which provides for the one-year limitation period for state prisoners to file habeas corpus petitions in federal court. Section 2244(d) states, in pertinent part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of :
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this

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[1] AEDPA applies to Petitioner's case as he filed his Petition in 2002. *Lindh v. Murphy*, 521 U.S. 320 (1997) (AEDPA applies to petitions for writs of habeas corpus filed in federal court after its effective date of April 24, 1996). Prior to AEDPA, there was no statute of limitations for federal habeas relief.

subsection.

28 U.S.C.A. § 2244(d) (West Supp. 2002).

Petitioner does not fall within the statutory tolling provisions of § 2244(d)(1)(B) or (C) as he does not: (a) show any impediment to filing an application by State action in violation of the United States Constitution; or (b) rely on a constitutional right newly recognized by the United States Supreme Court. Instead, this Court must determine whether §2244(d)(1)(A) or (D) applies and the date from which (under either section) the one-year period began to run. To complicate the matter, Petitioner's counsel deceived him by telling him an appeal was being pursued when in reality, it had been abandoned and eventually dismissed.

1. Applying §2244(d)(1)(A)

Under § 2244(d)(1)(A) the one-year limitation period begins to run on the date the judgment becomes final either by the conclusion of direct review or the expiration of the time for seeking such review.[2] Petitioner was sentenced on September 10, 1996. He timely filed a notice of appeal on October 25, 1996. Then his attorney failed to file an appeal brief. Because no brief was filed, the appeal was dismissed on April 28, 1997. Thus, thirty days later (*i.e.*, May 28, 1997) becomes the first critical date for purposes of identifying the start of the one-year time clock. This is because under California law, a judgment becomes "final" 30 days after the Court of Appeal orders an appeal dismissed. Rule 24 of the California Rules of Court states, "A decision of a Court of Appeal becomes final as to that court 30 days after filing....An order dismissing an appeal involuntarily is a decision for purposes of the preceding sentence." Consequently, under 2244(d)(1)(A), the decision became final on May 28, 1997 and the one-year limitation period expired on May 28, 1998. Under this scenario, there would be no statutory tolling under 2244(d)(2) because there was no pursuit of state collateral review during this period, and his federal petition would be four years too late.

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[2] A time line of significant events is attached for the reader's convenience. See Appendix.